Supreme Court, U. S.
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# 79-1109

IN THE

## Supreme Court of the United States

Nos. ~~79-1035~~
~~79-1036~~
~~79-1082~~
~~79-~~

HOUFF TRANSFER, INC., *Cross-Petitioner,*

~~and~~

~~NATIONAL LABOR RELATIONS BOARD,~~ *~~Petitioner in No. 79-1082,~~*

~~and~~

~~TIDEWATER MOTOR TRUCK ASSOCIATION AND DOLPHIN FORWARDING, INC.,~~

VS.

~~NEW YORK SHIPPING ASSOCIATION, INC., COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, AND~~ INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *et al.* *~~Petitioners in Nos. 79-1035 and 79-1036.~~*

**CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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## TABLE OF CONTENTS


| | Page No. |
|---|---|
| OPINIONS BELOW | 2 |
| JURISDICTION | 2 |
| QUESTIONS PRESENTED | 3 |
| STATUTORY PROVISIONS INVOLVED | 3 |
| STATEMENT OF THE CASE | 4 |
| REASONS FOR GRANTING THE WRIT | 11 |
| I. In These Cases An Unlawful Agreement Between Employer Associations And A Labor Organization, To Acquire Work Opportunities For Their Employees And Members By Means Of A Secondary Boycott, Has Been Upheld And Sanctioned By The Court Of Appeals | 12 |
| II. Substantial And Important And Recurring Questions Of National Labor Policy Are Here Presented, Upon Which The Court Of Appeals Has Rendered An Unprecedented Decision In Conflict With The Decisions Of Other United States Courts Of Appeals | 17 |
| CONCLUSION | 20 |


## CITATIONS

Cases:


*Humphrey v. International Longshoremen's Ass'n., AFL-CIO*, 548 F. 2d 494 (4th Cir. 1977) 5, 19

*International Longshoremen's Ass'n. (Associated Transport, Inc.)*, 231 N.L.R.B. 351, 96 L.R.R.M. 1636 (1977) 2

*Page No.*

*International Longshoremen's and Warehousemen's Union, Local 13 (California Cartage Co., Inc.)*, 208 N.L.R.B. 994, 85 L.R.R.M. 1300 (1974), *enf'd. sub nom. International Longshoremen's and Warehousemen's Union, Local 13 v. N.L.R.B.*, 515 F. 2d 1017 (D.C. Cir. 1975), *cert. den.*, 424 U.S. 942 (1976) ..... 15, 19

*International Longshoremen's Ass'n., AFL-CIO (Consolidated Express, Inc.)*, 221 N.L.R.B.956 (1975), *enf'd. sub nom. International Longshoremen's Ass'n., AFL-CIO v. N.L.R.B.*, 537 F. 2d 706 (2nd Cir. 1976), *cert. den.*, 429 U. S. 1041 (1977), *rehear. den.*, 430 U.S. 911 (1977) ..... 18, 19

*International Longshoremen's Ass'n. (Dolphin Forwarding, Inc.)*, 236 N.L.R.B. No. 42, 98 L.R.R.M. 1276 (1978) ..... 2

*International Longshoremen's Ass'n., Local 1575 v. N.L.R.B.*, 560 F. 2d 439 (1st Cir. 1977) ..... 19

Statutes:

28 U.S.C. §1254(1) (1976) ..... 3
29 U.S.C. §158(b) (4) (1976) ..... 3
29 U.S.C. §158(b) (4) (ii) (B) (1976) ..... 4
29 U.S.C. §158(e) (1976) ..... 4
29 U.S.C. §160(b) (1976) ..... 4
29 U.S.C. §160(e) (1976) ..... 11
29 U.S.C. §160(f) (1976) ..... 11
29 U.S.C. §160(1) (1976) ..... 5



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## CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

The National Labor Relations Board, and others above-named, have petitioned this Court for a Writ of Certiorari directed to the United States Court of Appeals

for the District of Columbia Circuit, to the end that this Court may review a decision which that Court has rendered in cases involving the parties above-named. Now comes Houff Transfer, Inc., and files this Cross-Petition, likewise praying the Court to grant such Writ of Certiorari, and this Cross-Petitioner respectfully shows to the Court:

## OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported officially.[1] A copy has been reproduced as Appendix A in the separately bound Joint Appendix to the Petitions in Nos. 79-1035 and 79-1036 (App. A at 1a-74a).[2] Pertinent decisions and orders of the National Labor Relations Board are *International Longshoremen's Ass'n. (Associated Transport, Inc.)* (App. B at 75a-98a), which is reported officially at 231 N.L.R.B. 351 (1977) and unofficially at 96 L.R.R.M. 1636 (1977), and *International Longshoremen's Ass'n. (Dolphin Forwarding, Inc.)* (App. C at 99a-116a), which appears officially at 236 N.L.R.B. No. 42 (1978) and unofficially at 98 L.R.R.M. 1276 (1978).

## JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on September 25, 1979. Petitions for rehearing *en banc* were denied on December 13, 1979 (App. H at 169a-178a). This Cross-Petition

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[1]It has been unofficially reported at 102 L.R.R.M. 2361.

[2]References are to the pages of the separately bound Joint Appendix in Nos. 79-1035 and 79-1036.



is being filed within apt time thereafter and as promptly as possible after receipt of the Petitions filed in this Court by the National Labor Relations Board and others. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1976).

## QUESTIONS PRESENTED

1. Whether employer associations and a labor organization lawfully agreed to cease doing business with motor carriers whose employees continued to engage in traditional motor-carrier employees' work of handling cargo in preparation for its over-the-road transportation, and whether the labor organization legally enforced that agreement?

2. Whether the "work-preservation" defense of the employer associations and labor organization, if otherwise availing, can be upheld in the face of incontrovertible evidence that the labor organization had waived and abandoned any and all possible claim to the specific "work in controversy", namely, the handling of "shipper's load cargo" in preparation for its over-the-road transportation?

## STATUTORY PROVISIONS INVOLVED

The relevant statutes, which are reproduced in the separately bound Joint Appendix to the Petitions in Nos. 79-1035 and 79-1036 (App. G at 166a-168a), are §§8(b)(4) and 8(e) of the Labor-Management Relations Act, 1947, as amended, 29 U.S.C. §§158(b)(4) and 158(e) (1976).

## STATEMENT OF THE CASE

This case originated in May of 1975 when Houff Transfer, Inc. (hereinafter "Houff") and other charging parties filed unfair labor practice charges with the National Labor Relations Board (hereinafter the "Board"). These charges alleged that the International Longshoremen's Association, AFL-CIO[1] (hereinafter the "ILA") and Council of North Atlantic Shipping Associations[2] (hereinafter "CONASA") were engaging in violations of Section 8(e)[3] of the Labor-Management Relations Act (hereinafter the "Act"), by agreeing to cease doing business with motor carriers whose employees continued to engage in traditional motor-carrier employees' work of handling cargo in preparation for its over-the-road transportation. Houff and the other charging parties also filed separate charges which alleged that the ILA was engaging in violations of Section 8(b)(4)(ii)(B)[4] of the Act, by enforcing the above-described agreement between CONASA and the ILA.

The Board's Regional Director determined that there was reasonable cause to believe the ILA and CONASA were violating the Act as alleged by the charging parties. The Regional Director accordingly issued consolidated complaints, pursuant to 29 U.S.C. §160(b).

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[1]And its constituent and affiliated labor organizations.

[2]An unincorporated organization whose members are shipping employers' associations for various East-coast ports.

[3]29 U.S.C. §158(e).

[4]29 U.S.C. §158(b)(4)(ii)(B).



The Board's Regional Director also sought and obtained preliminary injunctions[1] in United States District Courts in Norfolk and Baltimore, enjoining the alleged unfair labor practices in the Hampton Roads and Baltimore port areas.[2]

Upon the Regional Director's consolidated complaints, the merits of the unfair labor practice charges were tried before Administrative Law Judge Leonard M. Wagman.

At trial, the General Counsel's and charging parties' evidence was that longshoremen handled ocean-going cargo only at the piers, moving and placing packages, cartons, crates, boxes and other containers, of various sizes and descriptions, on and off ships.

About twenty years ago, the owners of ocean-going vessels began to develop the use of significantly larger containers, usually between twenty and forty feet in length. Cargo was loaded or "stuffed" into these larger "trailer-containers" which could be loaded on and off ships without loading and unloading the individual cargo items. As the handling of containerized cargo continued to develop, ships were fitted for carrying large numbers of trailer-containers which were loaded on and off ships by cranes. These containers were designed so that they could be hooked onto a power unit for motor-carrier transportation in the ordinary tractor-trailer configuration.

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[1]See 29 U.S.C. §160(1).

[2]See *Humphrey v. International Longshoremen's Ass'n., AFL-CIO*, 548 F. 2d 494 (4th Cir. 1977).

Prior to the vessel owners' utilization of trailer-containers, and prior to the advent of "containerization", motor carriers picked up cargo at inland places of business and delivered the cargo to the piers. Similarly, motor carriers picked up cargo at the piers and transported it to recipients' places of business. When circumstances dictated, the motor carrier could transport the cargo and other freight to its trucking terminal in the port city, for reloading into local equipment in which the cargo would be taken to the piers. In the case of import cargo, the motor carrier could, when circumstances dictated, pick up such cargo with local equipment and reload the cargo with other freight at the port-city trucking terminal, in preparation for over-the-road transportation.

After large trailer-containers were introduced to the maritime industry, there was no need for the individual cargo items housed in "shipper's load containers" to be removed from the containers at the piers. "Shipper's load cargo"—cargo consisting of a single shipper's goods, housed in a large trailer-container for transportation by sea and land to a single recipient—required no handling at the piers. In many cases, "shipper's load cargo" and the container in which it was housed simply could be attached to the motor carrier's tractor and towed directly to its destination.

"Shipper's load containers" always have moved through the New York, Baltimore, and Hampton Roads ports without longshoremen handling their contents



and without vessel owners, shippers or recipients having to pay or bear the costs of unnecessary "make-work" loading and unloading. Nevertheless, when some twenty years ago trailer-containers began to be used more extensively, the ILA contended that all trailer-containers were "an extension of the ship's hold" and that longshoremen were entitled to unload the contents of all such containers at the piers.

However, this contention on the part of the ILA was resolved by an agreement and settlement in the ILA's 1959 negotiations with New York Shipping Association, Inc. In such negotiations, as they pertained to "shipper's load containers", the ILA gave up the claim that longshoremen were entitled to unload "that piece of the hold". The 1959 agreement and settlement stipulated that "shipper's load containers" would be granted "free movement" in return for royalty payments to ILA benefit funds. Thus, the 1959 agreement substituted a royalty cost for the contention that longshoremen were entitled to unload the contents of "shipper's load containers" at the piers.

After 1959, none of the various versions or editions of Rules on Containers adopted by the ILA and CONASA made any claim whatever to the work of handling any "shipper's load cargo". The Rules definitely did not employ any language that could result in application of the Rules to "shipper's load" containers and cargo. The 1968 and 1971 Rules on Containers expressly and explicitly defined "the present work jurisdiction of longshoremen" as being "over any containers loaded with

LTL[1] cargo, or consolidated full container loads".[2] Other provisions of the 1968 and 1971 Rules further emphasized this limited work-jurisdiction claim, explicitly reciting that the Rules and the ILA's claim of work jurisdiction applied only to containers which housed "LTL" or "consolidated full" loads.

Both prior to the 1959 agreement and, consistent with their limited work-jurisdiction claim, after 1959, longshoremen never unloaded "shipper's load containers" at the piers. At all times, however, in connection with their over-the-road transportation of "shipper's load cargo", motor carriers continued to be confronted with the same operational and economic considerations which always had resulted in frequent reloading of various kinds of freight at trucking terminals. Vessel owners' trailer-containers also added new economic and operational considerations, including rental charges for the containers and the necessity for locating freight business to permit utilization of the container as it was towed back to the port area. When various considerations dictated, the motor carriers continued to unload and reload cargo housed in the trailer-containers, just as they previously had reloaded their own equipment.

Undeterred by all the foregoing circumstances, the ILA and CONASA, during 1973 and again during 1974, entered into totally unprecedented agreements that their Rules on Containers would apply to "shipper's load

[1]"LTL" refers to "less-than-truckload" cargo.

[2]Defined as loads which completely fill the container but are destined to more than one recipient.



containers". For the first time, "shipper's load containers" purportedly fell within the Rules' definition of containers to which the Rules applied. The ILA and CONASA also purported to enact a new Rule, restricting handling of "shipper's load cargo" to ILA members and to employees of the shippers and recipients.

Pursuant to these unprecedented agreements, fines of One Thousand Dollars were imposed upon vessel owners for each and every container in which the cargo was handled differently than the new Rules provided. The ILA and CONASA imposed such fines and caused cancellation of interchange agreements between vessel owners and motor carriers who saw fit to continue their established practice of handling "shipper's loads" and other cargo in connection with their routine over-the-road transportation operations. The ILA and CONASA thereby caused vessel owners to cease giving freight to motor carriers whose employees continued to handle "shipper's load cargo" and to cease furnishing such motor carriers with containers.

To strengthen enforcement of the new Rules, the ILA and CONASA also provided for a "blacklist" of motor carriers who continued their reloading practices, specifying that any container "consolidated or distributed" by such motor carriers would be deemed a violation of the Rules. The ILA and CONASA also agreed that any facility operated in violation of the Rules would not be "served" by any shipping employer and that the ILA would not supply labor to any such facility.

In the context of these developments, which at the time were totally unknown to Houff, Houff continued its practice of reloading "shipper's load cargo" at its trucking terminal. In early 1974, Houff picked up three "shipper's load containers" at the piers in Baltimore. These containers, which were destined to points in Virginia and West Virginia, were transported by Houff to its Baltimore terminal and there unloaded and the cargo reloaded into Houff's equipment. These particular containers were unloaded because they were unsafe and heavier than permitted by Virginia weight laws and in order to minimize expenses of transporting the cargo on the highways. ILA representatives learned of Houff's actions and caused the vessel owners which furnished the containers to be fined One Thousand Dollars in respect of each of the containers. When Houff refused to pay the vessel owners for the ILA fines, the vessel owners cancelled interchange agreements with Houff and, by refusing to furnish containers to Houff, ceased doing business with it. As a result, Houff's opportunities to transport "shipper's load cargo" were drastically diminished.

Upon all of the foregoing, Administrative Law Judge Wagman entered "rulings, findings, and conclusions" that the evidence demonstrated the ILA and CONASA were engaging in violations of the Act as alleged by the charging parties (App. D at 117a-157a). This Decision was affirmed by the Board's Decision and Order (App. B at 75a-98a).



Pursuant to Section 10(f)[1] of the Act, the ILA and CONASA petitioned the United States Court of Appeals for the District of Columbia Circuit to review and set aside the Board's Decision and Order. Pursuant to Section 10(e)[2] of the Act, the Board cross-applied for the Court of Appeals' enforcement of the Decision and Order.

A panel of the Court of Appeals, with one Judge dissenting, refused to enforce the Board's Decision and Order (App. A at 1a-74a). Petitions for rehearing *en banc* were denied, with four Judges voting in favor of rehearing *en banc* (App. H at 169a-178a).

## REASONS FOR GRANTING THE WRIT

It is respectfully submitted that the Court of Appeals' decision is in conflict with decisions of the United States Courts of Appeals for the First, Second, and Fourth Circuits and also is in conflict with a previous decision of the United States Court of Appeals for the District of Columbia Circuit itself. The Court of Appeals' decision involves substantial questions of national labor policy which are both important and recurring. The effects of the decision upon motor carriers' businesses, upon consumers, and ultimately upon the national economy will be devastating.

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[1]29 U.S.C. §160(f).

[2]29 U.S.C. §160(e).

## I.

**In These Cases An Unlawful Agreement Between Employer Associations And A Labor Organization, To Acquire Work Opportunities For Their Employees And Members By Means Of A Secondary Boycott, Has Been Upheld And Sanctioned By The Court Of Appeals**

In these cases only one defense has been made against the allegations that ILA and CONASA unlawfully agreed to cease doing business with Houff and others and that ILA illegally enforced such agreement. ILA's and CONASA's sole contention was that they sought only to secure to longshoremen work which was equivalent to that which had been traditionally performed by longshoremen. Regardless of what may be the applicability of this defense to the facts in distinguishable cases, it is a defense wholly unavailing here, where the "work in controversy" is demonstrably exactly the same work which motor-carrier employees have always performed and is not functionally equivalent to any work that longshoremen have ever performed.

The further facts are that in 1959 and repeatedly thereafter longshoremen waived and abandoned any claim to the work of loading and unloading "shipper's load cargo". In 1973 and 1974, however, they sought to claim and acquire the "work in controversy"; that is, the work of loading and unloading such cargo in preparation for its over-the-road transportation—no matter that this work, both prior and subsequent to the "container revolution" in the maritime industry, had always been performed exclusively by motor-carrier employees,



at trucking terminals, in the normal and regular conduct of surface-transportation operations.

With all due respect, Houff urgently asserts that the Court of Appeals has misapplied its legal analysis to the facts of the present case. In effect, the Court's "work-preservation" analysis is applied so as to uphold a blatant "work-acquisition" agreement and an illegal secondary boycott.

In the instant case, the specific "work in controversy" is certain handling of "shipper's load cargo"—that is, cargo consisting of a single shipper's goods, housed in a large trailer-container for transportation by sea and land to a single recipient. The handling of such cargo is done in preparation for its over-the-road transportation. Such handling is sometimes, but not always, necessary in the conduct of surface-transportation operations. It is work that always has been performed by motor-carrier employees in the ordinary course of their daily duties, and never has been performed by longshoremen. This work is done without any additional charge to the vessel owner, shipper or recipient. Indeed, there has been an additional charge only when either a shipper or a recipient has specified that the motor carrier was not to reload the cargo. This additional charge has compensated the motor carrier for a net cost increase resulting from not reloading when it would be economically advantageous to reload.

The Court of Appeals notes that longshoremen can handle "shipper's load cargo" at the piers, when and if any handling is required in preparation for over-the-

road transportation, as readily as motor-carrier employees can accomplish such handling at trucking terminals. The Court concludes that since longshoremen readily can perform, therefore they have the right to acquire and perform work which is done only for the convenience of motor carriers or as a part of surface-transportation operations, and which was performed by motor-carrier employees long before vessel owners began to use trailer-containers. Such a conclusion, it is submitted, goes far beyond, and cannot be justified on, any "work-preservation" rationale.

Because the work of handling cargo in preparation for its over-the-road transportation has always been accomplished either before or after longshore cargo handling at the piers, and has always been done for reasons connected only with surface-transportation operations, the "work in controversy" was not, prior to "containerization", and is not now, "equivalent" to the loading and unloading of ships.

Nevertheless, the Court of Appeals adopted the previously repudiated view that a trailer-container can be nothing but an "extension of the ship's hold" and that the handling of container cargo, within an arbitrary radius of many miles of a port, is the same as unloading a ship. Any application of the "extension of the hold" concept to situations in other types of cases is totally inappropriate upon the facts and issues in the present case.

Moreover, it is again to be emphasized that longshoremen, in return for royalty payments, relinquished



all claim to any handling of "shipper's load cargo" as it moved on and off ships. Certainly, however, there is no way that such relinquishment of claim can operate to extend the ship's hold into the surface-transportation industry, where the loading and reloading of trailers is normal and basic work.

Indeed, in an earlier similar case, a different panel of the same Court of Appeals rejected the notion that a container can be nothing but an "extension of the ship's hold" by sustaining a Labor Board decision in which the Board stated:

> ". . . [I]t is also true that the same container is part of a truck or perhaps a train. The traditional work of [longshoremen] has been to load and unload ships. To a large extent, the make-work rights claimed by longshoremen with respect to cargo placed on the dock were effectively bargained away . . ."
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> *International Longshoremen's and Warehousemen's Union, Local 13 (California Cartage Co., Inc.)*, 208 N.L.R.B. 994, 85 L.R.R.M. 1300, 1302 (1974), *enf'd. sub nom. International Longshoremen's and Warehousemen's Union, Local 13 v. N.L.R.B.*, 515 F. 2d 1017 (D.C. Cir. 1975), cert. den., 424 U.S. 942 (1976)

The Court below reasons that the challenged container rules are legitimate because the shipping-company owners of the containers have a "right to control" them. It is first to be observed that the work of handling

cargo is at issue in these cases—not the treatment of containers. Additionally, the container is *released* to the motor carrier, and the vessel owner, by the terms of the interchange agreement and other documents, retains neither control over nor responsibility for the "shipper's load container" or its contents.

Moreover, no false documentation is employed in this, because the cargo actually is transported to the recipient and to the precise destination specified in the documentation—the cargo merely is reloaded. Upon their release to a motor carrier, individual cargo items and containers with their contents are, and always have been, committed to the realm of surface-transportation operations and motor-carrier employees' work.

Again, the vessel owners have never been in any position to give longshore employees the work of handling "shipper's load cargo" in preparation for its over-the-road transportation, because vessel owners and maritime operations have had nothing to do with determining *whether* such work would be done. This work is performed only when the motor carrier perceives a convenience or necessity in performing it, in the immediate conduct of the surface-transportation industry.

Such work, accomplished by motor-carrier employees, has been dubbed by ILA and CONASA as "shortstopping". Houff submits that this "shortstopping" characterization is an ILA-CONASA smoke screen deployed in an effort to conceal a preexisting work tradition. ILA and CONASA utterly failed to show any application of their former Rules to "shipper's load cargo" handling



by motor-carrier employees. No tribunal has ever found any basis for such application. Indeed, and to the contrary, the Board found that ILA and CONASA never had any rule or understanding forbidding "shortstopping".

## II.

## Substantial And Important And Recurring Questions Of National Labor Policy Are Here Presented, Upon Which The Court Of Appeals Has Rendered An Unprecedented Decision In Conflict With The Decisions Of Other United States Courts Of Appeals

The decision of the Court below would require motor carriers to make operational judgments and decisions at the piers and at the time that ocean-going cargo arrives at the piers, rather than at the motor carriers' terminals and at the time the cargo is to be transported over the highways. Thus, motor carriers' operations will suffer, because the cargo handling is sometimes, though not always, necessary or convenient in the immediate conduct of surface-transportation operations.

The controverted cargo handling always has been performed by motor-carrier employees in the ordinary course of their daily duties, as a part of routine motor-carrier overhead, and, as has been pointed out, without any additional charge to the vessel owner, the shipper, or the recipient. Accordingly, motor-carrier employees, including those represented by other labor organizations, will be deprived of work they always have performed. Increased costs from additional

handling inevitably will be passed on to shippers, recipients, and the consuming public.

Moreover, the Court of Appeals' decision supports an ILA claim of the right to engage in "make-work" loading and unloading of all "shipper's load containers", affecting a substantial portion of all ocean-going shipments. The extraordinary effects of such a decision previously have been noted:

> ". . . Although ILA does not now claim the work of stuffing and stripping shippers' loads, the logic of its position would support a claim for all container work, without regard to the identity of the competing employees. As we noted in California Cartage Company, 'a boycott to enforce a claim to stuff shippers' loads and door-to-door deliveries would have an enormous impact on the shipping industry.' "
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> *International Longshoremen's Ass'n., AFL-CIO (Consolidated Express, Inc.)*, 221 N.L.R.B. 956, 961 (1975), *enf'd. sub nom. International Longshoremen's Ass'n., AFL-CIO v. N.L.R.B.*, 537 F. 2d 706 (2nd Cir. 1976), *cert. den.*, 429 U.S. 1041 (1977), *rehear. den.*, 430 U.S. 911 (1977)

Apart from the fact that the legal analysis of the Court below has no true application to the facts here presented, Houff also respectfully submits that the Court's decision is in irreconcilable conflict not only with a prior decision of the District of Columbia Circuit, but



also with decisions of three other Circuit Courts of Appeals. *See International Longshoremen's Ass'n., AFL-CIO v. N.L.R.B.*, 537 F. 2d 706 (2nd Cir. 1976), *cert. den.*, 429 U.S. 1041 (1977), *rehear. den.*, 430 U.S. 911 (1977); *International Longshoremen's Ass'n., Local 1575 v. N.L.R.B.*, 560 F. 2d 439 (1st Cir. 1977); *Humphrey v. International Longshoremen's Ass'n., AFL-CIO*, 548 F. 2d 494 (4th Cir. 1977); and *International Longshoremen's and Warehousemen's Union, Local 13 (California Cartage Co., Inc.)*, 208 N.L.R.B. 994 (1974), *enf'd. sub nom. International Longshoremen's and Warehousemen's Union, Local 13 v. N.L.R.B.*, 515 F. 2d 1017 (D.C. Cir. 1975), *cert. den.*, 424 U.S. 942 (1976).

The District of Columbia Circuit's enforcement of the Board's Decision and Order in *International Longshoremen's and Warehousemen's Union, Local 13 (California Cartage Co., Inc.), supra*, supports Houff's argument that longshoremen have abandoned any possible claim to any handling of "shipper's load cargo". The Board's Decision in that case also forecast the devastating consequences and impact of a decision such as has now been rendered by the same Court of Appeals in the present case. It is obvious that under the decision now in question motor carriers' operations and revenues would suffer, that consumers would bear additional costs, that the economy would be affected, and that employers whose operations have been devoted entirely to consolidating and forwarding ocean-going cargo would be put out of business.

## CONCLUSION

Upon all of the foregoing, the Cross-Petitioner respectfully prays for a Writ of Certiorari, directed to the United States Court of Appeals for the District of Columbia Circuit, to the end that this Court may review the decision which has been rendered by that Court in the present case.

Respectfully submitted,

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